No. 21,136

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, a corporation, and MARK FLETCHER, *Appellants,*

vs.

JOHN W. JARRETT and JUANITA F. JARRETT, *Appellees.*

BRIEF OF APPELLEES

Appeal from the United States District Court
for the District of Idaho
Southern Division

HONORABLE FRED M. TAYLOR, Judge

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STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

This action was commenced in the United States District Court for the District of Idaho, Southern Division, seeking damages for the alleged wrongful death of Catherine Joan Jarrett, daughter of John W. Jarrett and Juanita F. Jarrett, appellees. Appellees are citizens and residents of the State of Kansas (C.T. 6. All references hereinafter to "C.T." are to Clerk's Transcript, Volume One of Three Volumes of the record on this appeal). Defendants were the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher, a resident and citizen of Idaho, (C.T. 6) and Alma Nelson, Administratrix of the Estate of Herbert

E. Nelson, deceased, who was at his death a citizen and resident of the State of Idaho (C.T. 6). The amount in controversy exceeds $10,000.00, exclusive of interest and costs (C.T. 7).

Jurisdiction of this action was founded on diversity of citizenship and the amount in controversy and results from the provisions of 28 U.S.C.A. Sec. 1332 (C.T. 7).

Jurisdiction for the review of this matter is conferred by the provisions of 28 U.S.C.A. Sec. 1291 and Rule 73, Federal Rules of Civil Procedure.

On October 12, 1964, John W. Jarrett and Juanita F. Jarrett instituted an action against the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher and Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased, seeking $1,000.00 special damages and $150,000.00 general damages alleging the same arose from the death of their daughter Catherine Joan Jarrett in a collision between a train operated by the Railroad Company and Mr. Fletcher and an automobile operated by decedent Herbert E. Nelson at a railroad crossing in Boise, Idaho on February 15, 1964. (C.T. 6-11). The collision was alleged to have occurred as the result of negligent, careless, wrongful, reckless and unlawful acts on the part of all of the defendants. (C.T. 9).

Separate answers were filed by the Union Pacific Railroad Company and its employee, Mark Fletcher (C.T. 22-27), and by Alma Nelson (C.T. 52-56). The case came on for jury trial commencing November 29, 1965 (C.T. 220). Motions for a directed verdict were made by appel-

lants Union Pacific Railroad Company and Mark Fletcher at the conclusion of the plaintiff's evidence (C.T. 223) and at the close of all of the evidence (C.T. 227) and denied each time. On December 2, 1965 the jury returned a verdict in favor of the appellees and against all defendants in the sum of $60,000.00 (C.T. 229), and judgment was entered thereon forthwith (C.T. 230).

On December 10, 1965, appellants filed their Motion for Judgment Notwithstanding the Verdict or for a New Trial (C.T. 235-238) which were by the Court denied on March 1, 1966 (C.T. 312), whereupon this appeal was taken from the final judgment and from the order denying said motion for judgment notwithstanding the verdict or for a new trial.

This Court is without jurisdiction to review that portion of the judgment which was entered in favor of John W. Jarrett and Juanita F. Jarrett and against Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased (C.T. 230) for the reason that the same has become final, no appeal having been taken by Alma Nelson.

QUESTIONS INVOLVED AND MANNER RAISED

The questions on this appeal are; was there sufficient negligence shown on behalf of the Union Pacific Railroad Company and its engineer Fletcher to warrant the trial court submitting the case to the jury, which was raised by conflicts in evidence between the train crew as to warnings, obstructed view, hazardous crossing, and speeds, and that

adducel through other witnesses and objective evidence of photographs, engineering drawing, and speed tape from the engine.

And was the jury verdict of $60,000.00 too high, raised by appellants contention that it must have been rendered under influence of passion and prejudice resulting in a miscarriage of justice.

SUMMARY OF THE ARGUMENT WITH POINTS AND AUTHORITIES

I.

The negligence of Herbert E. Nelson was not the sole proximate cause of the collision, and his negligence was not imputable to Catherine Jarrett 14 years old who was riding in the back seat of the Buick sedan being taken by Nelson to his home to baby-sit. The facts concerning the negligence of the Railroad company and engineer Fletcher show that the train was being operated at 70 miles per hour at the point of impact, (Exhibit 27) that just before the application of emergency braking to stop it had been accelerating through urban sections of Boise (Exhibit 1) up to 73 miles per hour into hazardous crossing at Roosevelt Street with substantially obstructed view of motorist to the west from which the train was approaching, with railroad rules permitting 60 miles per hour speed (Exhibit 25), when the streets were slick from snow and ice. The warnings of whistle and bell were not properly and timely sounded as required by statute. The train movement was not prudently operated under the circumstances existing

with due and ordinary care, and such concurrent negligence combined with that of Nelson to constitute the joint tort liability as found by the jury on questions of negligence properly before them on behalf of the Railroad and Fletcher, as well as Nelson.

Idaho Code, Section 62-412
52 American Jurisprudence 452 Section 112
Bunker Hill and Sullivan Mining and Concentration Co. v. Polak,
1925 9th Cir. Idaho D.C. N.D. 7 F2d 583
Baqwell v Southern Ry. Co.
1938 W.D. So. C. 21 F Sup 751

Woodman v Knight, 1963 85 Idaho 453, 380 P2d 222

Viehweg v Mt. Sts. Tel. & Tel. Co.
1956 D.C. Idaho E.D. 141 F Sup 848

Olin v Honstead, 1939 60 Idaho 211 91 P2d 380

Moran v Washington, Idaho and Montana Railroad Co., 1960, 9th Cir. Idaho D.C. C.D. 279 F2d 935

Fleenor v Oregon Short Line R.R. Co.
1909 16 Idaho 781, 102 Pac. 897

Stowers v Union Pac. R. Co.,
1951 72 Idaho 87, 237 P2d 1041

Yearout v. Chi. M. St. P. and Pac. R. Co.
1960 82 Idaho 466 354 P2d 759
162 A L R 9

Becham v Hines,
1922 6th Cir. Ky Dist. 279 F 241

Miller v Union Pac. R. Co.,
1933 290 U.S. 227, 78 Led 285

2.

The operators of trains do have legal obligation to prudently operate trains at crossings to avoid injury and death to others, and they do not have unrestricted license to approach and go through crossing at whatever speeds they wish regardless of characteristics of the crossing such as the Roosevelt crossing in Boise urban district which was stop street for heavy traffic from Boise bench to downtown routing for bridge over Boise River, where the view of approaching train is obstructed to the motorist, and on February 15, 1964 at 8:55 P.M. Union Pacific mail and passenger train No. 12 was approaching the Boise passenger station when the streets were slick from fresh snow and the proper and required signal and bell warnings were not given by the train crew, and such failure to sound the statutory warnings is negligence per se.

Idaho Code, Section 62-412

Jarrett v Wabash Ry. Co.,
1932 2nd Cir. D.C. N.Y. E.D., 57 F2d 669

Southern Pac. R. Co. v Stephens,
1928 9th Cir. D.C. Cal. N.D. 24 F2d 182

Patterson v Penn. R. Co.,
1956 6th Cir. D.C. Mich. E.D. 238 F2d 645

Northern Pac. R. Co. v Everett,
1956 9th Cir. D.C. Wash. 232 F2d 488

Missouri Pac. R. Co. v Soileau,
1959 5th Cir. D.C. La. W.D. 265 F2d 90

Fleenor v Oregon Short Line R.R. Co.,
1909 16 Idaho 781, 102 Pac. 897

Valles v Union Pac. R. Co.,
1951 72 Idaho 231 238 P2d 1154

Atlantic Coast Line R. Co. v Grimes,
1959 Ga. SE2d 890

3.

The evidence is not clear that Nelson did not stop for the stop sign, it is clear that there was no stop sign for the railroad tracks and the only stop sign was for Alpine Street paralleling the tracks on their south, and there is evidence Nelson may have stopped for the stop sign and his view of the approaching train was substantially obscured by houses and trees before reaching Alpine, and after crossing Alpine, by the weeds, utility poles and signal house until it was too late for him to stop for the tracks. The jury did not have to find that the acts of Nelson resulting in the collision were intentional. Catherine Jarrett was not riding as his guest but was under his employment as a baby-sitter, and Nelson's negligence is not imputed to this girl who had no control over the operation of Nelson's car. Nelson's acts could not reasonably be found to be the sole cause of the collision which issue was properly submitted to the jury.

Miller v. Union Pac. R. Co.,
1933 290 U.S. 227, 78 Led 285

Valles v Union Pac. R. Co.,
1951 72 Idaho 231, 238 P2d 1154

Idaho Code, Section 49-1102

4

While the snow and icy condition of the streets was a part of the circumstances under which the collision occurred they could not be found to be the sole proximate cause of the injuries as contended by appellant. The District Judge did not err in refusing to give the requested instruction to this effect. The train operator was imprudent in failing to recognize the added hazard of the snow and ice to the already hazardous Roosevelt Street crossing because of obstructed view, no stop sign for the tracks, and expectant travel on a busy urban stop street, literally leaving no margin of safety for others at 73 miles per hour speed, and there was actionable negligence from failure to exercise reasonable care in order to avoid injury and death to others.

Fleenor v Oregon Short Line R. R. Co.,
1909 16 Idaho 781, 102 Pac. 897

Johnston v Key System Transit Lines,
1959 Calif. 334 P2d 243

5.

Unless the verdict appears to have been given under the influence of passion or prejudice and a manifest miscarriage of justice would result from letting it stand there is no basis for new trial or reduction of the amount. There

is no evidence in this case that would bring the $60,000.00 verdict within the rule. The trial court could plainly see there was no miscarriage of justice, and that the jury had properly followed the law in fixing damages as under all the circumstances of the case were just. The qualities of Catherine Jarrett whose life was taken and the characteristics that give those values to her mother and father who lost her society, companionship and comfort were fairly and legally evaluated by the jury, and the finding is not too much as contended by appellants.

Idaho Code, Section 5-310

Idaho Code, Section 5-311

Hepp v Adder, 1942 64 Idaho 240, 130 P2d 859

Hayward v Yost, 1952 72 Idaho 415, 242 P2d 971

Anderson v Great Northern Ry. Co.,
1908 15 Idaho 513, 99 Pac. 91

Butler v Townsend, 1931 50 Idaho 452 298 Pac. 375

Royal Crown Bottling Co. v Bell,
1959 Ga. 111 SE 2d 734

Blisard v Vargo, 1961 6th Cir. Mich. D.C. 286 F2d 169

Mann v Bowman Transportation, Inc.,
1962 4th Cir. So. Car. D.C. 300 F2d 505

Sandifer Oil Co. v Dew, 1954 Miss. 71 So. 2d 752

Mock v Atlantic Coast Line R. Co.,
1955 S.C. 87 SE 2d 830

McKirdy v Cascio, 1955 Conn. 111 A2d 555
14 A L R 2d 550 Annotation Infant Death Damages
A L R 2d Supplemental Service 1965, page 152

Short v Boise Valley Traction Co.,
1924 38 Idaho 593, 225 Pac. 398

Ellis v Ashton and St. Anthony Power Co.,
1925 41 Idaho 106, 238 Pac. 517

Osier v Consumers Co.,
1926 42 Idaho 789, 248 Pac. 438

Nelson v Johnson, 1925 41 Idaho 697 243 Pac. 647

Reinhold v Spencer, 1933 53 Idaho 688, 26 P2d 796

Checketts v Bowman, 1950 70 Idaho 463, 220 P2d 682

Covey Gas & Oil Co. v Checketts,
1951 9th Cir. D. Idaho 187 F2d 561

Southern Pac. Co. v Guthrie,
1951 9th Cir. N.D. Cal., 186 F2d 926

Dagnello v Long Island R. R. Co.,
1961 2nd Cir. S.D. N.Y. 289 F2d 797

Union Pacific R. R. Co. v Johnson,
1957 9th Cir. D. Idaho 249 F2d 674

Steinbock v Schieve,
1964 9th Cir. D. Oregon, 330 F2d 510

MacDonald Engineering Co. v Hoover,
1961 8th Cir. 290 F2d 301

ARGUMENT

6.

Railroad Has Duty of Prudent Operation

There is no contention that trains must be prepared to stop at all times, but 73 miles per hour approach to the Roosevelt Street crossing without warning of whistle and bell when the roads were icy and the motorist's view obstructed is not prudent operation or exercise of due care to avoid injury to others raising issues of negligence for jury consideration. The question is, was the train operated negligently under existing circumstances, and were there facts in evidence from which reasonable minds might differ to present jury question on such negligence. True there was no city ordinance setting a speed limit, and even the railroads rule of speed at this crossing at 60 miles per hour (Exhibit 25, pages 8 and 20, R. T. 137) would be too fast for prudence under existing circumstances. Warnings from the speeding train, lack of protection for the crossing, and obstructed view were all factors bearing on the railroad negligence. To say there could have been no negligence because the train could not have stopped for the crossing just does not consider the existing circumstances in accordance with the law applicable in these cases. *Conner v Penn. R. Co.,* 1959 3rd Cir. E. D. Penn. 263 F2d 944, and *Owens v Chiago R. I. and P. R. Co.,* 1961 10th Cir. D. Kan., relied upon by defense support this rule. The speed was a jury question in *Conner* holding warnings are part of the circumstances, and *Owens* lacked evidence to take the case

to the jury as there was no permissible inference of negligence where the train was traveling at less than the 30 mile speed fixed by the city. *Ralph v Union Pacific R. Co.,* 1960 82 Idaho 240, 351 P2d 464, relied upon by appellants is fully distinguishable on its facts warranting judgment notwithstanding verdict as it was a country crossing at 1:15 A. M. in October without ice or snow condition, the plaintiff driver of the car was guilty of manifest contributory negligence in approaching well marked crossing with unobstructed view of train running 35 miles per hour while she drove into the crossing at unreduced speed of more than 55 miles per hour. Likewise the defense authority of *Orsbon v B. & O. R. Co.,* 1962 Ohio D. C. 206 F. Supp. 356 where the plaintiff truck driver was found contributorily negligent in collision with train approaching the crossing at 22 miles per hour with diesel horn and bell sounded and no obstructions to motorist view located on railroad right of way, is no comfort to the appellants here. Clear daylight existed with no snow or ice, and plaintiff was held negligent as matter of law with no evidence of any negligence of defendant which could be considered proximate cause.

Ineas v Union Pac. R. Co., 1952 72 Idaho 390, 241 P2d 1178, cited by appellants is not in point because there was a defense verdict of the jury where issue of contributory negligence was involvd. So to is *Whiffn v Union Pac. R. Co.,* 1939 60 Idaho 141, 82 P2 540, relied upon by appellants, not here controlling and is distinguished by issues of contributory negligence and there was an activated lighted wig-wag sigal warning to denote presence of the

train, and deceased motorist, whose husband brought action, had control of the car.

7.

Nelson's Acts Were Not Sole Proximate of Cause of Collision, and There Was Concurrent Negligence

Appellants argue that if Nelson had looked he could have seen the train. But in examining the evidence in this regard we find that from the position when stopped for the stop sign protecting Alpine Street running parallel to the railroad tracks there are trees and houses obstructing view of appoaching train from motorist's left. (Exhibits 2, 4, 6, 7, 8, 10, 12 and 14). The stop sign is 100 feet from the south rail. (Exhibit 41) After proceeding north past the stop sign and into and across Alpine there would be good view to the left or westerly that could include view of the railroad tracks, but it must be noted that train lights approaching from the left could well be thought to be motor vehicles proceeding easterly on Alpine, and there would be no expectation that such would be traveling at speeds in ranges of 70 miles per hour. The street and the tracks run close together here. (Exhibit 1) After the motorist traverses the Alpine-Roosevelt intersection his view to the left of approaching rail travel as will be seen from the exhibits (supra) is dangerously obstructed. A most significant obstacle is the signal house which is situated 165 feet west of the crossing and effectively blocks any view until the front of Nelson's Buick was about 12 feet from the south rail, and was a constant blinder for the previous 10 feet at hight of 9 feet (R. T. 340, Exhibit 41) couple

this with the electric wire poles and signal posts and weeds shown by the true perspective exhibits to be on the railroad right of way between the south boundary of the signal house and the north boundary of Alpine Street, and it can be seen why this was a dangerous and hazardous crossing of which the appellants should have been mindful as part of the existing circumstances when they chose to approach it at 73 miles per hour on February 15, 1964 when the city streets were icy and slick. These were facts for jury consideration as to any negligence of appellants. The panoramic photographs of the railroad (Exhibits 21, 22 and 43 did not fairly depict the view, (R. T. 49-52) but rather an expanded abnormal view, in distortion of the normal human vision views depicted by Exhibits 2, 4, 6, 7, 8, 10, 12, and 14. (R. T. 60, 61, 224, 225, 226)

The only direct evidence that Nelson did not stop for the stop sign for Alpine Street came from the train crew, (Engineer Fletcher, R. T. 146, 169 and Fireman Henderson, R. T. 389-391) yet a line of sight projection on Exhibit 41 would indicate that Fletcher could not even see where the stop sign was from the 600 foot position west of the crossing because of the trees obscuring his line of sight.

Mrs. Van Engelen, a disinterested witness, who was following Nelson's car testified she couldn't say whether he stopped for the Alpine Street stop sign, (R .T. 71, 78) she could not testify he did not stop. Mr. Leaper who says he heard, inside his house near the crossing, but did not see Nelson's car prior to the collision, two efforts of the car to make forward progress on the icy street. The first thing

that attracted his attention "was the screeching the car trying to get into motion" and it was in two parts "just like somebody that started up, and then started up again." This was the sound of whine of tires on the slick street. (R. T. 92 and 93) The first whine of the tires to get started could well have been his stop for the Alpine Street stop sign an inference the jury could have drawn from the evidence in conflict with the interested evidence of the train crew that he did not stop at the sign. This adds up that the evidence will not support appellant's contention that the sole proximate cause of the collision was a failure of Nelson to stop for the stop sign on Alpine. There was no stop sign for the railroad tracks and the stop sign for Alpine was 100 feet from the tracks. (Exhibit 41) The stop sign shown on Exhibit 41 near the cross buck is stop sign protecting Roosevelt Street and faced west bound traffic on Alpine.

Of course Nelson was negligent in failing to observe all the circumstances as they were, and to keep his car under proper control but the evidence will not support that the entire fault had to be, or was his. There were many factors on which reasonable minds might differ which made proper jury question for concurrent negligence of the joint torts which combined to cause the injuries. Important issues existed regarding the train operation failure to warn and its speed. Although appellant engineer testified they were slowing down for the Boise depot a little bit before Orchard Street crossing (R. T. 139) Orchard being one half mile or 2460 feet west of Roosevelt Street crossing,

and the depot is 4800 feet east of Roosevelt (Exhibit 1) the speed tape Exhibit 27 shows no lessening of speed at this course but a maintained speed of 73 miles per hour until the emergency application of the brakes which reduced the speed to 70 at the time of collision where the speed stopped registering at Roosevelt crossing. Appellant Fletcher had testified that he was only going about 55 miles per hour at emergency application. (R. T. 159) And he had told the investigating police officer Loomis he approximated his speed at 55 miles per hour at the time of the accident. (R. T. 266) Fireman Henderson testified they were running into Boise at 70 miles per hour before the first application of air for brakes was made in the vicinity of Orchard which reduced the speed there (First Federal Savings building) to 60, (R. T. 386 and 387) but Exhibit 27 showed the only speed of 60 to be as the train was picking up speed after the stop at Meridian. These made jury questions concerning conflicts in speed evidence.

On the question of failure to warn there is additional conflict in the evidence, and failure of warning by whistle or bell from the engine was by competent disinterested witesses, even though the engine crew of course testified the bell was ringing and the whistle sounded. It is significant that appellant engineer did not testify that he sounded the statutory whistle warning 80 rods (1320 feet) before Roosevelt crossing (Idaho Code 62-412) his testimony being that when he saw Nelson's car 600 feet ahead of him he "was blowing the whistle as hard as I could blow, * * * and "I went into emergency." (R. T. 158 and

167) The fireman Henderson did testify that the engineer did give the whistle warning for Roosevelt crossing but it began east of the Garden Street crossing which was 1320 feet west of Roosevelt, (R. T. 388, 389) and that the signal was two long a short and a long. (R. T. 395) They both said the train bell was started at the Perkins crossing (R.T. 159, 395) which was near the Boise junction west of Orchard, milepost B-450.7. (Exhibit 25 page 20) There is not evidence from the train crew that the statutory whistle warning was sounded 1320 feet west of Roosevelt crossing and a 73 miles per hour this would be essential to give motorist at Roosevelt timely warning of trains approach, and its lack would be negligence per se of the appellants. At the 73 miles per hour the train was traveling at 108 feet per second which gave 12 seconds between the Garden and Roosevelt Street crossings. (Exhibit 1, R.T. 229) This illustrates how important the statutory timely warning is and why speed is a factor of negligence under the circumstances.

The evidence of audible warnings of the speeding train to motorists is that Marvin Wood who drove across Roosevelt crossing first ahead f Nelson saw the train coming but did not hear whistle or bell, (R. T. 203, 204, 211, 222, 224) although he could hear the sound of the moving train and the collision. His daughter Sharon Wood who was riding with him and looked back to see the Nelson car head lights and the train collide and heard the bang did not hear any whistle or bell warning. (R.T. 112, 114) Mrs. Van Engelen driving the car following Nelson did not know

that a train was coming had not heard any train whistle or bell (R.T. 72, 73, 83) the first she had heard or saw of the train was when it collided with Nelson's car at the crossing. This evidence of failure of audible warning all came from disinterested witnesses with highest degree of credibility and they were in the best positions to know if the whistle and bell were in fact sounded in time to warn Nelson. Although some of the evidence on failure of warning was negative this made jury questions as to negligence of appellants. Marvin Wood who saw the collision in his rear view mirror testified that if the train had whistled he was "sure that I would have heard it." (R.T. 211) This was positive evidence that the warnings were not properly given in conflict with that of the train crew and produced jury question on appellant's negligence nullifying propriety for directed verdict. It was the jury's duty to decide which was the more credible evidence and most free from bias by personal interest, and these issues were properly submitted to the jury by the trial court. The witness for the railroad who testified about audible warning was Mrs. Dorothy Nichols who first learned of the accident after hearing the report on the radio she and her husband were listening to at the time. They lived on Alpine three houses west of Roosevelt crossing and usually heard trains go past the house but "don't pay too much attention." She heard a large screech sound which she thought was a whistle, and said "but the screech was what drew my attention." She did not hear the train's bell. (R.T. 378-381) Danny Ramsey, a ten year old boy playing army in the neighborhood with two other boys heard train whistle and impact but

did not look toward the train when it whistled making no evidence as to location of train when whistling (R.T. 373-375) Mr. Leaper was in his house east of the Roosevelt crossing on Alpine, and although he remembered hearing the whistle prior to the collision he "didn't hear a bell." (R.T. 96) and testified "I would say that it was a few seconds between the whistle and the thud." (R.T. 101) "Q. The whistle that you heard was just before you heard the sound of the impact? A. Yes, just before." (R.T. 103, 104) The whistle at this point could have no value as a warning and would be too late for anyone to have done anything about the impending collision. The evidence of whistling is linked most plausibly to the emergency after the engine was only 5 or 6 seconds from committed collision. The probative value of the evidence on audible warning at the proper time and place as related to motorists at Roosevelt crossing was proper jury question, and from these facts in evidence it could not be held as a matter of law that there could have been no negligence on the part of th railroad and its engineer to give the statutory warning signals for the crossing as required by Idaho Code 62-412. A jury question was obviously present, and a violation of this statute is negligence per se by rule of *Stowers v Union Pac. R. Co.* 1951 72 Idaho 87 237 P2d 1041, and *Yearout v Chicago, Milwaukee, St. Paul and Pacific R. W.* 1960 82 Idaho 466 354 P2d 759, and on such point this case held:

> "The failure of the operators of a train to give the statutory signal is negligence per se; likewise the fail-

> ure of a driver of a motor vehicle to comply with the statute is negligence per se. The evidence was conflicting as to whether the whistle was blown and the bell was sounded. We are bound by the juries finding against defendant on this issue."

A 73 mile per hour pace through Boise City street crossings one block (80 rods, 1320 feet, ¼ mile) apart allows only 12 seconds to give the whistle signal of two long, one short, and one long whistle soundings and demonstrates why slower speed is necessary for warnings to be effective to motorists within prudent train operation in discharge of duty to exercise ordinary care.

Even the negative evidence causes the conflict for jury question. There is extensive annotation on the probative force of testimony offered to show that crossing signals were not given on approach of train at 162 ALR 9. Appellees do not rely upon the scintilla doctrine; the testimony of Mrs. Van Engelen and Sharon Wood, who next to the train crew were in the best position to know, testified that they heard no whistle or bell, and likewise Marvin Wood that they were not sounded in substantial evidence of the failure of the whistle and bell warnings at the proper time. These eye witnesses to the collision supplied competent evidence for the jury question and support the test of whether upon the whole evidence adduced reasonable persons might reach different conclusions.

Upon the question whether bell and whistle were sounded, as claimed by appellants, the court is not required, in considering the propriety of directing verdict, to take into

account the superior means of knowledge possessed by the members of the train crew. While the testimony of train employees as to sounding of bell or whistle should not be discredited merely because of their employment, it cannot be accepted by the court as conclusive merely because they were in a position giving them better means of knowledge than other witnesses. Their credibility was solely for the jury. *Bechham v Hines,* 1922 6th Cir. Ken. Dist. 279 F 241.

Jarrett v Wabash Ry. Co. 1932 2nd Cir. D.C. N.Y. E.D. 57 F2d 699, was a crossing accident where there was issue as to whether the train gave the statutory crossing signals, and the court in affirming judgment on verdict for the plaintiffs in wrongful death action held:

> "The testimony to the effect that the engine whistle was blown and the bell rung was given by employees of appellant, and, of course, their interest as such made their credibility a question of fact for the jury." (citing authorities) Accord *Southern Pac. Co. v Stephens* 1928 9th Cir. D.C. Cal. N.D. 24 F2d 182.

In *Patterson v Pennsylvania R. Co.* 1956 6th Cir. D.C. Mich E.D. 238 F2d 645 a paving crew within half a block of the railroad crossing testified they did not hear an engine bell or whistle as the train approached the crossing. Railroad employees testified that the whistle on the train was loud enough to be heard three or four blocks away. Both the engineer and the fireman testified that the bell was rung and the whistle sounded, and the court in holding that a jury question was thus presented said:

> "The Supreme Court of Michigan has held the testimony of several witnesses, though negative in character, that from positions at which they might have heard they did not hear crossing signals sounded, to be sufficient to carry the question to the jury. * * * where a witness is in a position where he would normally hear, his failure to do so presents an issue as to the existence of the fact."

Here the court also held that contributory negligence was also a jury question and reversed the District Court which had granted motion for judgment notwithstanding the verdict. In accordance is *Northern Pac. Ry. Co. v Everett,* 1965 9th Cir. D.C. Wash. 232 F2d 488 which holds that whether the engineer failed to sound the train whistle as required by law, and whether such failure to sound a timely whistle was a proximate cause of death from a train-car collision were jury questions. Accord *Missouri Pac. Ry. Co. v Soileau,* 1959 5th Cir. D.C. La. W.D. 265 F2d 90.

The old case of *Fleenor v Oregon Short Line R.R. Co.,* 1909 16 Idaho 781, 102 Pac. 897, although a pedestrian railroad crossing case contains important Idaho law in point with this Jarrett case covering elements of duty of care of a railroad in operation of its trains at crossings respecting speed and warnings and nature of the evidence thereof, and jury question from conflict on negative testimony, and the court in affirming judgment for widow of deceased husband killed by train at crossing held, according to the syllabus by the court:

"1. Where the plaintiff in an action for damages against a railroad company alleges several separate and independent acts of negligence as all concurring in the accident and consequent damages, and the acts charged are of such a nature that the accident might have occurred and the injury resulted from any one of such acts independently of any or all of the others, it will be sufficient to entitle the plaintiff to recover if he prove any act or acts alleged from which the jury may reasonably believe the accident occurred and the injury resulted.

2. As a general rule, the evidence of one who testifies to a negative is not entitled to the same weight as that of one who testifies to a positive. This general rule, however, is subject to the exception that where the evidence of an affirmative and positive issue necessarily consists in proof that a thing did not exist or an act did not take place, and the witness was placed under such circumstances and was in such position that he could as readily see and would as likely have seen or heard as the witnesses who testified that the act occurred or the thing did exist, then the testimony of such witness partakes of the nature of positive evidence and becomes proof of a positive issue.

3. Where witnesses testify positively that a bell was rung and a whistle sounded on a locomotive engine and that the engine was at the same time displaying a headlight, and other witnesses testify that they did not see a headlight and did not hear a bell or

whistle, and it appears from the evidence that the latter witnesses were looking and listening for the train and were in a position near the track where they could see and hear equally as well as the other witnesses, the evidence of those testifying to the negative is entitled to go to the jury and be considered by them the same as that of the witnesses testifying to the positive.

4. Where the employees of a railroad company are running a train over a public crossing at such a high and dangerous rate of speed as to become within itself negligent management and operation of the train and engine, and an accident results as a consequence thereof, or while such train is being operated at such high and dangerous rate of speed, it is proper for the evidence of such fact to be submitted to the jury, and for the jury to consider the same in determining whether or not the company was guilty of negligence in the resulting injury.

5. The fact that a railway train is run at a high and dangerous rate of speed at a street crossing is no excuse or justification for a person subjecting himself to the danger and hazard of being run over by attempting to cross the track in front of such train. The same duty to observe diligence and care at public crossings for the prevention of injury rests equally and alike on both the railroad company and pedestrians and other travelers crossing a railroad track, subject, however, to that other duty of pedestrians and other tavelers crossing a railroad track to look and listen for

on-coming trains and to clear the track that they may pass without injury being inflicted.

6. The duty of a railroad company to ring a bell or blow a whistle in approaching a crossing is imposed by positive statute of this state, and a failure to do so is negligence per se; while the duty to maintain gates and station a flagman at a crossing is not enjoined by statute; still, uder certain conditions and circumstances a failure to do so would constitute negligence at common law, for the consequences of which the company would be liable. Under all such circumstances the question of negligence in failing to maintain gates or keep a flagman at a crossing is a question of fact to be determined by the jury.

7. A prima facie presumption arises in the absence of evidence to the contrary that one who is killed while attempting to cross a railroad track at a public crossing stopped, looked and listened before going upon the track.

8. Where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions hight reasonably be reached by different minds, the question of negligence is one of fact to be submitted to jury. Where upon all the facts and circumstances there is a reasonable chance or likelihood of the conclusions of reasonable men differing, the question is one for the jury."

The case of *Smith v Sharp*, 1960 82 Idaho 420 quoted as authority for the defense contains no law as applied to its different facts that conflicts with the Jarretts' rights of recovery. This was action against the motorist and the city of Pocatello to recover for death of minors who drowned when the car was driven through a barrier at a dead end steet, and the demurrer to plaintiffs complaint was sustained with right to amend.

Accordingly in appellant's case of *Ranstrom v Oregon Short Line R. Co.*, 1936 D.C. Idaho E.D. 18 F Supp. 256 where demurrer was sustained to plaintiff's complaint, it is distinguished on its facts, being where recovery for n-juries were sought where the motorist in a fog ran into the side of a train that was already passing through the crossing.

Also the case of *Rowe v Northern Pac. R. Co.*, 1932 52 Idaho 649 17 P2d 352 cited by appellants was where the motorist drove into a standing box car at a grade crossing in Moscow. These cases where the train already occupies the crossing are entirely different than the one at bar. Then the train is always straight ahead for the motorist to see, and of course there are thus different issues as to the proximate cause of the collision. We have a speeding train coming to the crossing with obstructed view and lack of audible warning and which hit the Nelson car after it was on the track.

It is true that Nelson had to be mindful of the railroad crossing and of course he was negligent as shown by the evidence but there is no evidence that he knew the train

was coming until it was too late by virtue of the lack of control over his car, but this negligence was not imputable to Catherine Jarrett. It could not be right to say the railroad had no responsibility for what happened under all the circumstances. This case is not within the facts giving rise to the decisions in *Dale v Jaeqer,* 1927 44 Idaho 576 258 Pac. 1081 (contributory negligence of guest in auto accident) and *Shelite v Chicago R. I. and P. R. Co.,* 1962 10th Cir. D.C. Kan. 307 F2d 49, (where the court found there was evidence of contributory negligence of the deceased passengers) as there was no evidence of contributory negligence by Catherie Jarrett. Just because counsel in his brief contends there must have been contributory ngligence by Catherine does not make such so, and the jury had this before them under proper instructions and the finding was to the contrary.

Defense authority of *Louisville and Nashville R. Co. v Fisher,* 1962 Ky. 357 SW 2d 683 is distinguished by being another situation where the action was for wrongful death of the car driver at the crossing and the court found he was contributorily negligent as a matter of law. Such might be precedent in this case if the heirs of Nelson were the plaintiffs, but even then under the Idaho rule his contributory negligence would be jury question. Another important point of distinction is that there was no issue of the whistle and the bell being sounded, the only witness to testify for the plaintiff heard not only the bell and whistle but the train itself when it was a half block away from the crossing.

The assumptions made by appellants that Miss Jarrett must have been responsible for her own death are just not consistent with any of the facts in evidence. Unfortunate as it was for the railroad to be linked in tort with Nelson there is no evidence to shunt the responsibility for what happened to Catherine Jarrett. To sustain this theory the contributory negligence of Catherine would have to be a legal presumption which of course is not the law. Even the *Fisher* case states the rule on this:

> "The rule in such cases is that where there is no evidence, direct or circumstantial, of conduct of the injured party, indicium of his negligence, there is in death cases a presumption of due care on his part."

And the Yearout case supra adds that

> "However, the negligence of the driver cannot be imputed to the plaintiff, since the plaintiff had no control, or right of control, over the driver in his operation of the truck. Valles v Union Pac. R. Co., 72 Idaho 231, 238 P2d 1154; Miller v Union Pac. R. Co., 290 U.S. 227 54 C. Ct. 172, 78 Led 285."

Valles v Union Pac. R. Co., 1951 72 Idaho 231 238 P2d 1154, is another authoritative joint tort action for injuries and death of minor occupants of automobile that was struck by the streamlinere at Weiser, Idaho on May 20, 1950 and suit was brought against the railroad and driver of the car Saturo Nakamura which resulted in judgment for the parents of the injured children, the holding affirming the judgment included:

"Witnesses for appellant testified the whistle on the streamliner was blown at various points as it was approaching the crossing. Witnesses for respondents testifled they were in positions to hear and listen, did so, and heard no bell or whistle. There thus was a conflict in the evidence and this was question for the jury. Hobbs v Union Pac. R. Co., 62 Idaho 58, at page 64, 108 P2d 841; 162 ALR 1054. Thus, and on the hereinafter analysis as to proximate cause the learned trial court properly denied appellants motion for non suit and directed verdicts."

"Appellant contends, nevertheless, as its first assignment of error now before us, that Saturo Nakamura was guilty of contributory negligence in that he did not stop, look and listen when in a place of safety and that he could and should have seen the Streamliner. Appellant does not particularly stress that Saturo Nakamura's contributory negligence was imputed to respondents' decedents or Eligio, but perhaps sufficiently so presents it that we should dispose of it. The court instructed that Nakamura's contributory negligence, if any was not imputed to decedents or Eligio (Inst. No. 10) but that decedents and Eligio were not absolved from exercising care for their own safety, (Inst. No. 14)"

> "Decedents and Eligio were employees of Saturo Nakamura and his associates. At the trial Eligio testified through an interpreter. He suffered a concussion in the accident and remembered nothing of

> the affair; the youths had no dominion or control over the driver and under the circumstances Nakamura's contributory negligence, if any, was not imputable to them." (citing authorities)

As in the appellants' opening brief in this Jarret case contention was made that the car driver's negligence absolved them of liability as being the sole proximate cause of the injuries but on this phase the Court in *Valles* holds:

> "Appellant's main contention on this point is that Saturo Nakamura's contributory negligence was the proximate cause; that is, the fial, actual, intervening cause of the injury, which interrupted and cut off appellant's negligence if any, and therefore since there can be but one proximate cause, Nakamura's contributory negligence is the proximate cause which absolves appellant from liability."
>
> "The relative distance of the Streamliner from the crossing when the engine thereof was visible to Saturo Nakamura from behind the retreating end of the westbound train; his speed in approaching and entering the crossing; when the engineer and fireman saw the automobile, and what, if any, might have been the effect upon Nakamura if the whistle had been sounded, were fully delineated.
>
> "The solution of and factual conclusions to be drawn from, these various factors were clearly within the province of the jury."

The law of this case was held to be:

"A proximate cause is one from which the jury complained of is the ordinary and natural result, and is usual and might have been reasonably expected to occur from such cause."

" * * * the proximate cause of an injury may be the concurrent negligent acts or omissions of two or more persons acting independently of each other."

" * * * the negligence of any one of the defendants in order to render such defendant liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes, other than the plaintiff's fault, is the proximate cause of the injury. * * * It is no defense to any one of the several defendants that the injury would not have resulted from his negligence alone, without the concurrent negligence or wrongful act of the other defendants."

Within these rules of law the Union Pacific was not prudent to provide for its operation of their train at some 73 miles per hour through the Boise City crossings and should have forseen that such violent accidents were likely to occur from the traffic that regularly used the crossing, and could there be normally expected. Engineer Fletcher should have foreseen the importance of reduced speed to avoid injury to others under the particular circumstances of slick streets and sound the statutory and railroad rule warnings. The failure of the whistle and bell to properly warn, the ex-

cessive train speed at obstructed view crossing were all evidence of negligence of the railroad and Fletcher which concurred with the negligence of Nelson by his improper car operation to be the proximate cause of appellees' daughter's death. Any conception of reasonable and ordinary prudence dictate these acts to be wrong and constitute negligence on behalf of all the defendants, and these were the facts properly before the jury on which the verdict was based.

The United States Supreme Court case of *Miller v Union Pac. R. Co.*, 1933 290 U.S. 227, 78 Led 285 is a leading authority on proximate cause for death of a person killed at a railroad crossing while a passenger in a car driven by a negligent motorist. And it was held that a railroad company cannot defeat recovery for the death of the wife, not herself chargeable with contributory negligence, when the car driven by her husband was struck by a train at a crossing, upon the ground that the proximate cause of her death was not its negligence, but the negligence of the husband in driving upon the track in face of the approaching train where the negligence charged against the railroad company was not only the failure to sound the whistle but the operation of the train at a dangerous speed, concurrent with the negligence of the husband.

Much of the controlling law of appellees' cases is found in this *Miller* case as concerns the issues on this appeal as the railroad defense theories are parallel, but the Supreme

Court in reversing denial of recovery for wrongful death of the wife passenger held as shown by the quoted portion of the court's opinion set out in the appendix.

This U. S. Supreme Court case has particular applicability to the situation of Catherine in Nelson's car, and as previously herein analyzed distinguishes entirely from the *Ineas* case, as there was no evidence whatever of any contributory negligence of decedent. The foregoing authorities show as applied to the facts in evidence that the trial court properly denied the appellants' motion for a directed verdict under Rule 50 (a) Federal Rules of Civil Procedure, and likewise the Motion for Judgment Notwithstanding the Verdict under Rule 50 (b). There was no error in the trial, and no occasion for correction.

The issues of the concurrent negligence which was the proximate cause of the injury were jury questions and decided by them in proper form of verdict which was not contrary to the evidence or law of the case as properly instructed by the trial court.

Appellants argue that only the superseding negligence of Nelson to any of their previous negligence had to be the sole proximate cause of the collision, but this theory does not fit the facts and the law.

The railroad provided its train to be operated at imprudent speeds in movement through Boise City at the Orchard, Garden and Roosevelt Street crossings which are high traffic and arterial city streets, (Exhibit 1) and failed to have any rule to slow down under hazardous circum-

stances to discharge its duty of ordinary care to avoid injury to others. The engineer Fletcher failed to give proper warning as equired by law of his approach to the crossing, did not heed his duty of ordinary care to slow his train when he could see the streets were dangerously slick and that the view of his approach was obstructed to motorist approaching to his right. Nelson failed in his duty to keep his car under proper control to avoid the train hitting him at a dangerous railroad crossing. While there are issues as to these acts of concurrent negligence, and there can be no doubt that they constitute proper jury questions of proximate cause of the injuries. The test of negligence is that of prudence and due care under the circumstances of all those who participated in the events causing the injuries, and it could not fairly be said from the evidence that the jury could not find that the railroad, the engineer, and Nelson acted imprudently, and the jury specifically found against all under the theory of joint tort in which they were properly instructed on the law.

> "A person who joins in committing a tort cannot escape liability by showing that another person is liable also; that a third person co-operated in the wrong is no justification for the misconduct of the defendant. The general rule as to this matter is that joint tortfeasors are jointly and severely liable. Hence, a tort jointly committed by several may be treated as joint or several at the election of the aggrieved party. All the authorities agree as to the applicability of these

rules where there is a breach of a common duty." 52 American Jurisprudence 448 Section 110

"There is much authority in favor of the principle that joint, or more precisely, joint and several, liability may exist notwithstanding the absence of concerted action on the part of wrongdoers. Thus, where the indepedent tortious acts of two or more persons supplement one another and concur in contributing to the producing a single individible injury, such persons have in legal contemplation been regarded as joint tort-feasors, notwithstanding the absence of concerted action. This rule has been regarded as applicable as the acts are concurrent as to place and time and unite in setting in operation a single destructive and dangerous force which produces the injury."

52 American Jurisprudence 452 Section 112

Accord *Bunker Hill and Sullivan Mining and Concentrating Co.,* 1925 9th Cir. Idaho D.C. Northern Div., 7 F2d 583. Also *Bagwell v Southern Ry. Co.,* 1938 W.D. South Carolina 21 F Sup. 751, a crossing accident case an action to recover damages for death of passenger in car with issues of train warning holds such situation joint tort.

Woodman v Knight, 1963 85 Idaho 453, 380 P2d 222 holds accordingly:

'Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery

> may be had against any or all of the responsible persons."

Vichweg v Mountain States Telephone and Telegraph Co., 1956, D.C. Idaho E.D. 141 F. Supp. 848, succintly states the rule of proximate cause of joint tort thusly:

> "The majority rule is that where the negligence of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concerted action." (citing many authorities.)

This Idaho rule of law is also stated in *Olin v Honstead* 1939 60 Idaho 211, page 223 as follows:

> "It hardly requires the citation of authorities to the proposition that if the negligence of one tort-feasor concurs with the negligence of another to produce a single result, which would not have happened but for such concurrence, both tort-feasors are liable though their acts or omissions of negligence were independent of each other. (Woodland v Portneuf Marsh Valley Irr. Co., 26 Idaho 789, 146 Pac. 1106; 62 C.J. 1133; McDonald v Robinson et al., 207 Iowa, 1293, 224 N.W. 820, 62 ALR 1419. See, also, Brose v Twin Falls Land & Water Co., et al., 24 Idaho 226, 133 Pac. 673, 46 L.R.A., N.S., 1187.)"

Most assuredly the appellants' contention that the verdict of the jury in finding against the Nelson estate was an exoneration of the railroad and the engineer, as they

thereby found the negligence of Nelson was the sole proximate cause is not consistent with the verdict under the instructions and the facts of the joint tort. There is no competent evidence that Nelson saw or heard the train until it was too late, and it would be incredible that he deliberately drove in front of the train inviting sudden death. Failure of timely warning and obstructed view of the speeding train had its effect on the position he obviously belatedly found himself in. Examination of the pictures and particularly Exhibits 14, 10 and 12 which illustrate the motorists view in the west direction of the approaching train, (R.T. 28, 29) show how difficult is would be to see the train only except when driving north across Alpine Street, and it is most significant that there was no stop sign for the railroad track proper. The line of sight as illustrated by the engineering drawing of the crossing Exhibit 41 shows the trees obstructions particularly respecting the engineer's testimony that he first saw the car 600 feet away.

This was a cold icy night, car windows would be rolled up and perhaps even steamed or frosted up, being part of the circumstances the railroad operation should contemplate in going through urban crossings bearing on their exercise of due care within the ordinary rules of prudence. Nelson could have mistaken the engine headlight for that of a car coming from the west on Alpine Street parallel to the railroad tracks, and of course would not anticipate that any car would be traveling at 73 miles per hour as the train was. The facts left by the dead people certainly indicate some confusion, it would be true that Nelson knew there

were railroad tracks there but there is no proof that he was not confused about the presence and speed of the train until it was too late. These are the facts in combination which the jury would have considered in rendering their verdict against the railroad and the engineer as well as against Nelson who too was negligent.

Stowers v Union Pac. R. Co., 1951 72 Idaho 87 237 P2d 104, cited by defense is of no comfort to them, as there was a question of contributory negligence of the decedent as to advising the driver of the car that the way was clear, which the court held presented a jury question and reversing as error the tial court granting defense motion for judgment notwithstanding the verdict for the plaintiffs. This case states the law respectig judgment notwithstanding the verdict saying:

> "Through a long and unbroken line of decisions this court has held that where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence, contributory negligence and proximate cause is one of fact to be submitted to the jury and not a question of law for the court; if, upon all the facts and circumstances, there is reasonable chance of likelihood of the conclusions of reasonable men differing, the question is one for the jury." Citing many cases.

"The question of the existence of negligence and contributory negligence only becomes a question of law when the evidence is susceptible of no other reasonable interpretation than the conduct of the injured party contributed to his injury and that because of his negligence and carelessness he did not act as a reasonably prudent person would have acted under the circumstances. Hobbs v Union Pacific R. R. Co. 62 Idaho 58, 108 P2d 841."

The case of *Bazzell v Atchison, T. & S.F. Ry. Co.*, 1931 Kan. 5 P2d 804, cited by appellants is no controlling authority on facts or law. It was a private country crossing the train speed was 55 miles per hour, the deceased girl was riding in the front seat with her brother and her contributory negligence was established by the evidence. *Yearout v Chicago, Milw., St. Paul & Roc. R. Co.*, 1960 82 Idaho 466, 354 P2d 759 relied so heavily upon by appellants to nullify application of the *Moran* case is not in point on the facts. Plaintiff Yearout riding in the seat of a truck driven by his son was found contributorily negligent as a matter of law as the train was clearly visible to him in time to act to prevent the accident. The train speed was 5 miles per hour at the crossing approach.

8.

The Verdict Against Nelson Estate Is Not Foreclosure of Cause Again Appellants

The appellants contend that the finding of negligence and liability of Nelson by the jury foreclosed any cause

against the railroad by virtue of the Idaho guest statute, Idaho Code 49-1401. Their argument is another tack of reasoning on proximate cause. The case was not defended on theory of lack of liability for injury to guest and no instruction of the law in this regard was involved. The facts were that Catherine was employed by Nelson as a baby sitter and he was taking her to his home for that purpose. The law was correctly instructed by the trial court by Instruction No. 14 (R.T. 423) which says in its final paragraph:

> "When the negligent acts or omissions of two or more persons contribute concurrently and as proximate causes to the injury on another, each of such persons is liable. This is true regardless of the relative blame or fault of each."

The trial judge by Instruction No. 16 (R.T. 425) instructed:

> "You are instructed that the negligence, if any, of the driver of the automobile in which Catherine Joan Jarrett was riding is not as a matter of law imputable to the decedent Catherine Joan Jarrett."

Appellants' position that the jury had to find Nelson guilty of gross negligence under the guest statute consequently shifting all blame for the collision on him absolving the railroad of any responsibility is not borne out by the facts, the law, and the verdict made under proper instructions. There was nothing inconsistent for the jury to find both against Nelson and appellants. His blood alcohol

level was slightly bcow that which the Idaho Code 49-1102 presumes to be itoxicated. (Instruction No. 19, R.T. 429) This law provides that:

> "3. If there was at the time 0.15 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor."

Exhibit 33 shows that Nelson's blood alcohol was .149 percent, enough to be intoxicated (R.T. 303) but below the statutory presumption, and Wilber Siegenbein testified he did not appear intoxicated, (R.T. 324) and this would have important bearing on the jury's consideration of Nelson's degree of negligence at the crossing. But this docs not warrant appellants' position that if Nelson were liable they could not be. That the Nelson estate did not appeal is not relevant to appellants' joint tort liability. There is vast distinction from *Hickert v Wright,* Kan. 319 P2d 152, cited by the defense on issue of superseding or concurrent negligence where a faulty tire mounting was sought to be linked with later independent act of high speed and wreck from tire blow out, and a speeding train without proper warning striking motorist at busy urban grade crossing. The coming later in point of time was a matter of few seconds with appellants' train running at 108 feet per second it cannot be rationally reasoned that appellants' acts were remote and non-contributory within the rule that the doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability for wrongdoing. It is hard to imagine a better satisfaction of the continuity rule

for joint tort than in this Jarrett case. The timing sequence for proper whistle warning for Roosevelt crossing would be 12 to 15 seconds at just before the Garden Street crossing, hardly remote and independent, but actually a part of res gestae.

The proposition that passengers, guests or otherwise can't recover because of negligence of drivers is completely answered by the many cases in line with the *Miller* case supra, and of course *Moran v Washington, Idaho and Montana R. Co.,* 1960 9th Cir. Idaho D.C. 279 F2d 935 decided by this court and now in point with the case at bar. Here the 9th Circuit Court reversed the Distict Court's judgment for defendant notwithstanding verdict for the plaintiffs, who were parents of a high school boy who had been killed when the pickup truck in which he was a passenger struck the side of the train engine at a crossing. The holding was that question of contributory negligence was for the jury, and that negligence, if any, of the driver of the truck could not be imputed to the deceased passenger. There was evidence that the required warnings for the crossing had not been given by the train by sounding of the whistle and bell which presented a jury question as to negligence of the defendant railroad. There was evidence of view obstruction on approach of the train from the driver's left on emergence from a cut at a country crossing near Bovill, Idaho with no automatic lighted or moving warning signals at the crossing. There were three boys in the pickup seat with decedent on the right side and the two boys who survived that accident testified that decedent had

called a warning to the driver that "there's the train." Both the survivors testified that they heard no warning horn or whistle of the train, but the train personnel testified that whistle was blown at intervals up until the train started to use its brakes. Both the driver of the truck and the decedent had traveled over the crossing on many occasions before. The train speed was 24 miles per hour. The 9th Circuit here held:

> "It is conceded by appellee that upon a motion for a directed verdict appellants were entitled to have the evidence viewed in a light most advantageous to them. With this rule in mind, we turn to the question of whether or not there was evidence of the railroad's negligence which would be sufficient to be considered by the jury.
>
> Concerning the question of whether the whistle was blown or not, we have on one side the negative testimony of the truck driver and his passenger that they did not hear the whistle, and on the other side the positive testimony of the trainmen that the whistle was blown. This question was considered recently by the Supreme Court of Idaho in Ralph v Union Pac. R. Co. Idaho 351 P2d 464, 467. The Court said:
>
> > "In considering the question whether respondents sounded a bell or whistle in approaching the crossing, we are quite aware of the negative aspect of the testimony of appellants' witness, the bus driver, and of the positive testimony of respondents' witness,

> the railroad's fireman * * *. Negative evidence is entitled to consideration unless it 'is so destitute of probative value that it will not be received.' Kerby v Oregon Short Line R. Co., 45 Idaho 636 264 P. 377 * * *.
>
> "We must assume facts however most favorable to appellants first that respondents failed to sound a bell or whistle in approaching the crossing in the face of respondents' assertion that they did * * *."
>
> 'The District Court, in granting the motion notwithstanding the verdict, held that "the sole proximate cause of this accident * * * was the negligence of the driver of the truck in failing to heed the warning of the railroad crossing; to look and listen for approaching trains and, if necessary, to stop." In this case, however, it is and of course must be conceded that the negligence, if any, of the driver of the truck is not to be imputed to the decedent."
>
> "The decedent, of course, was required to exercise ordinary care for his own safety. Ineas v Union Pac. R. Co., 72 Idaho 390 241 P2d 1178, 1179. None of the cases cited by appellee put upon a passenger in an automobile any greater duty than to exercise ordinary care under all the circumstances."

We of course can never know what Catherine Jarrett may have done or said about the train. The law presumes she acted with due care. *Fleenor v Oregon Short Line R. R. Co.*, 1909, 16 Idaho 781 102 Pac. 897, and there is no evi-

dence to the contrary. It must be remembered that the evidence does show that she was a considerate well mannered girl of 14 years, that she was riding in the back seat of a Buick Sedan, (R.T. 318, 323) with Mr. Nelson driving with another man in the front seat with him, it was a winter night, she had done baby sitting for the Nelsons before, he was a truck driver by vocation, (R.T. 281) she would have had no control over the car, her view of the approaching train would have been obstructed by the houses and trees fronting Alpine Street, the utility poles and weeds on the railroad right-of-way to the west of the crossing and the signal structures and the signal control house as shown by the pictures in evidence.

The facts here are certainly not within the confines of *Ineas v Union Pac. R. Co.,* 1952 72 Idaho 390, 241 P2d 1178 as contended by the appellants. A girl of such tender years could not be held a party to Nelson's violation of law in operation of his car by failing to maintain proper control under the existing circumstances. There was no evidence of covering over the view windows of the car, and the evidence did show that the approaching train would not be clearly visible. Catherine would not have been aware of Nelson's violation of any express statutes, nor is there evidence to show that she should have gotten out of the car to avoid the accident. She was a helpless victim of the concurrent negligence of the dangerous train operation at 73 miles per hour with failure to warn of its presence and the wrongful operation of his car by Nelson in failure to maintain safe control, but none of this negligence is imputable to Cather-

ine, 38 Am. Jur. 938 Sec. 247, 127 ALR 1455. 8 Am. Jur. 2d Automobiles Sec. 670, stating the rule as follows:

> "Modern authorities have, with few exceptions adopted the rule that the contributory negligence of the driver of a vehicle is not imputable to another occupant of the vehicle who has no control or authority over the driver so as to prevent the former, when injured by the concurrent negligence of the driver and another person, from recovering from the third person. In accord with this rule, it is well established that the contributory negligence of the driver of an automobile cannot be imputed to a guest or passenger riding therein who has no control or authority over the driver or over the operation of the car; a guest having no such control or authority over the driver or the automobile is not precluded from recovering from a third party for injuries received in a collision due to the concurring negligence of such third party and the driver in which the guest does not participate." 5 Am. Jur. 781 Sec. 494, Accord the *Moran* case.

None of the negligence of Nelson was imputable to Catherine, and there was no evidence of any ngligence on her part, and if there had been it was with proper instructions submitted to the jury as an issue in the case and by them determined. As held by the *Moran* case, the rule is:

> "Normally, the question of the contributory negligence of a passenger is a question of fact. In Stowers v Union Pac. R. Co. 72 Idaho 87, 237 P2d 1041, 1945, the court said:

"The question of the existence of negligence and contributory negligence only becomes a question of law when the evidence is susceptible of no other reasonable interpretation than the conduct of the injured party contributed to his injury and that because of his negligence and carelessness he did not act as a reasonably prudent person would have acted under the circumstances * *.

"In determining the question of contributory negligence due care or ordinary prudence under the circumstances is the only test. The presence or absence of contributory negligence must be judged by the conditions, circumstances and surroundings at the time of the accident and whether under such the person acted as a reasonably prudent person would have acted * * .

"It is ordinarily a question for the jury whether a person injured exercised due care in looking and listening where his view or his hearing is obstructed by darkness or dust or wind, or by a combination of two or more of these conditins * * ."

"It appears to us that under the evidence in this case reasonable minds could differ as to whether or not decedent in this case exercised ordinary care for his own safety, and that the matter should have been left to the determination of the jury. It cannot be said as a matter of law that decedent exercised no care for his own safety or was riding in the truck blindly without

> observing conditions about him. Assuming as we must assume, that no warning was sounded by the train, it was shown that the decedent was alert enough to call a warning to the driver as soon as the train emerged into view from the cut. We hold that it cannot be said that the decedent was guilty of contributory negligence as a matter of law.
>
> The judgment of the District Court is reversed with instructions to reinstate the jury verdict."

There is no way to learn when Catherine discovered the presence of the train or what warning she may have called to Mr. Nelson, but it could not be found that she was guilty of contributory negligence as a matter of law, and the jury did not find that she was guilty of contributory negligence as a matter of fact.

To say that no facts exist upon which it can be said that either Fletcher or the railroad were negligent, and certainly none which contributed to the collision, as contended by the appellants, could only be reasoned on the theory that the king can do no wrong. However more moderate train speeds were required through the city to provide some margin of safety to satisfy ordinary standards of prudence so that obsevations and warnings by the train crew can have semblance of reasonable effectiveness. Unfettered speed license does not satisfy any critera of due care within fundamental rules of tort law. To ignore all the circumstances except the time table is not prudent.

9.

There Was No Error in the Trial Prejudicial to Appellants and New Trial Is Not Warranted

There is no reason for a new trial of this case, and there was no error of the trial court not directing verdict for appellants, and he properly submitted the case to the jury which warrants support of the rule of appellants' authority of *McCracken v Richmond, F. & P. Ry. Co.,* 1957 4th Cir. D.C. Vir. 240 F2d 484, which reversed a directed verdict for the railroad and ordered a new trial so the issues could be decided by a juy, holding:

> "Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelming so as to leave no room to doubt what the fact is."

The record shows there was no miscarriage of justice by the jury finding all three defendants negligent resulting in joint tort causing injuries, and holding against appellants was in no sense against the weight of the evidence. The negligence of appellants is not to be absolved by that of Nelson. It would be difficult to imagine a more adequate case of concurrent negligence for jury decision than here proved, and the verdict was most certainly not against the weight of evidence as to all of the defendants.

10.

$60,000 for Loss of Catherine Jarrett to Her Parents Is Not Excessive

Appellants argue that the verdict is so large that it surely must have been rendered under the influence of passion and prejudice, and is such as to shock one's conscience, but there are no facts in this case that could bring the verdict within this rule, and the trial court could plainly so see in ruling upon defense motion for judgment notwithstanding the verdict or for a new trial. (C.T. 235, 312) The trial judge could see there was no passion or prejudice of the jury and no shock to the conscience in awarding $60,000.00 for the loss of Catherine's life to her parents. They urge such is especially so as to the railroad and Fletcher because they feel their negligence was less than that of Nelson. However, although there is nothing in the law providing for comparing negligence in degrees among joint tort feasors for lessening respective liability, in this case it certainly could be found by the jury that the railroad's and Fletcher's faults would far exceed those of Nelson as discussed in detail in our previous paragraphs, particularly the company providing for 60 miles per hour speed at the hazardous Roosevelt crossing with obstructed view, and the engineer approaching it a 73 miles per hour without statutory and adequate effective audible warnings by whistle and bell, in addition to the icy slick conditions of the streets that he should have foreseen would cause trouble to motorists ability to control their cars that night. Although there was no issue that the engine head light was lighted

there was issue as to whether it was, before emergency application, the mars oscillating type that would add distinguishment to a train approaching the crossing rather than an automobile approaching on Alpine Street which could not have been forseen by a motorist in Nelson's position to be approaching at 73 miles per hour into a city street intersection, comprising part of the existing circumstances for the rules of prudence. Mr. Wood in the best position to know because he was the one facing the engine as it approached the crossing testified that he saw the head light (R.T. 203) as he drove over the crossing ahead of the train, that it was a bright light (R.T. 207) but that he "did not see the light swinging back and forth" (R.T. 208) and at no time did he see the mars light in operation in its white or red function. (R.T. 221) The oscillating light evidence came from the train crew, Fletcher (R.T. 158) and fireman Henderson (R.T. 388) and made conflict in the evidence for jury question. There is no basis for appellants' contention that the jury was attempting to inflict punishment or retribution, or that they went beyond the court's instructions in awarding just damages for plaintiff's loss. (R.T. 444 Inst. 33, 446 Inst. 34, 456 Inst. 35, 451 Inst. 36, 452, Inst. 37) There can be no quarrel with the legal principal urged by appellants that there must be reasonable relationship between the injuries sustained and the damages awarded.

In this modern day under normal relationships between parent and child the old historical concept that a parent could expect to obtain contributions from the earnings of

their child to be considered as an item of damage resulting from their wrongful death, is now a completely unrealistic and outmoded concept. Children do not contribute earnings to their parents in the ordinary practice, and Catherine Jarrett was no exception to this, and hence there was no evidence in the case or any theory for recovery pursued by appellees for rights of recovery for expectant contributions from earnings of their daughter lost because of her wrongful death. Appellants are quite right in their argument that a child and particularly a girl is an expense to her parents. The prospect of obtaining money from a child during minority and afterward is, normally and in this case, too remote to be the basis of proper award of damages, and no evidence was or could be established here or recovery sought for damages on that basis, (C.T. 10) and this is according to the record properly before the jury.

The law of the right to and the damages recoverable from wrongful death cause in Idaho are stated by *Idaho Code 5-311* stating when the death of a person is caused by the wrongful act or neglect of another his heirs may maintain an action for damages against those responsible for the negligence, *and such damages may be given as under all the circumstances of the case may be just,* and this statutory law as interpreted by the courts as illustrated by the line of authority in *Hepp v Adder,* 1942 64 Idaho 240, 130 P2d 859, wherein it is held:

> "Although the decisions are agreed that recovery may not be had for grief and anguish suffered by the surviving relatives of the deceased, it may be had, in

Idaho for loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc. (Wyland v Twin Falls Canal Co., 48 Ida. 789, 285 Pac. 676.)"

"It is not necessary, in this state, for a husband or wife, in order to recover for the death of the other, caused by wrongful act or negligence, to plead or prove damages arising from loss of services, food, clothing, shelter or anything else which may be measured in dollars and cents. The same rule applies in cases where a parent sues for the death of a child or the child for the death of a parent. Pecuniary loss, in cases of this kind, will be presumed upon proof of death, caused by the wrongful act or negligence of the defendant, and the relationship of husband and wife, or parent and child, existing between the plaintiff and the deceased. Anderson v Great Northern Ry. Co., 15 Idaho 513, 99 Pac. 91; Kelly v Lemhi Ins. and Orchard Co., Ltd., 30 Ida. 778 168 Pac. 1076; Wyland v. Twin Falls Canal Co., 48 Idaho 789, 285 Pac. 676; Butler v Townend, 50 Ida. 542, 298 Pac. 375; Willi v Schaefer Hitchcock Co., 53 Ida. 367, 25 Pac. 2nd 167."

"Fixing amount of damages to be awarded, in a case involving death by wrongful act or negligence, is the duty and responsibility of the jury."

This following earlier case of *Anderson v Great Northern Ry. Co.,* 1908, 15 Idaho 513, 99 Pac. 91 which holds:

> "The jury * * * may take into consideration the degree of intimacy existing between the father and the child and the loss of companionship if such be shown. The jury is authorized to assess such pecuniary damages 'as under all the circumstances of the case may be just' and in such case they are not limited to precise and specific pecuniary amount measured by the direct evidence given in the case, but are at liberty to take into consideration, guided by the evidence given in the case, the intrinsic probabilities that damages have been sustained by and on account of the loss of bodily care or intellectual culture or moral training which the parent of the deceased have previously supplied or bestowed."

The jury is to decide what the value of the loss of the life is to the heirs as may be just under all circumstances as the rule is stated in *Butler v Townsend* 1931 50 Idaho 542, 298 Pac. 375, as follows:

> "In cases of this character it is not possible to prove the damage with any approximation to certainty. The jury must estimate them as best they can by reasonable probabilities, based upon their sound judgment as to what would be just and proper under all of the circumstances." (citing numerous authorities)

In addition to the legal presumption of pecuniary loss as fixed by the foregoing authorities the appellees' evidence established the specific losses resulting to both parents by Catherine's death, by their loss of her society, companionship and comfort as items of compensatory damage within

the law of the *Hepp* case. Examination of the evidence as to what this loss really was shows that Catherine was a splendid person and daughter, (Exhibit 28) and close loving family relationship. (R.T. 276-279, 311-315) The quality of the person whose life has been taken and the characteristics that give the values to the parents who have lost her society, companionship, and comfort as would be seen by the jury from the evidence of Catherine as a living person comprise facts for evaluation by the jury to decide what is just. The evidence is clear that she was an exceptionally good student. (R.T. 189-192, 185-189, 107-110, 193-196, 325-328) Her report cards and the testimony of her teachers showed her academic capabilities and potential, with the teachers supplying impartial evidence about the fine characteristics of her personality, attitudes, intelligence, health, sincerity, dependability, energy diligence in acquiring education and getting along with people. The teacher's written comments on the report cards showing extraordinary results are significant evidence of her good qualities, and their testimony that she was college material are competent evidence of her promising potential. (Exhibits 23, 29, 30, 31, 40) This is evidence the jury could view in determining just values for what had been lost to her parents which actuarially would have continued through the life expectancy of the parents of 22 and 24 years. (R.T. 280, 314)

The evidence of good relationship between Catherine and her mother and father on which there was no issue, was close, warm and loving, that she was cheerful and con-

siderate, that she was a happy part of their lives and of great comfort to them, her singing spirit and her laughter contributed to their mutual society and companionship. Her intelligence and school achievements were source of pride, and that their memories about her had not been forgotten. That what Catherine's parents had missed about her was a daily experience. This will continue. The loss since her death has not diminished. That they shared her accomplishments, and gave them much to be proud of. Plans were considered for her future, she was interested in nursing career even at 14, and her aptitude in science, mathematics, and language were outstanding. This evidence all adds up to Catherine being a wonderful daughter that was lost to her parents, and these were the facts before the jury, when they found the plaintiffs sustained damages of $60,000.00 by this loss.

Life is the most valuable thing known to mankind, and while the law recognizes that it is not a simple task for a jury to decide what are such damages under all the circumstances of the case may be just, it is still their duty and responsibility under wrongful death case. The issue here on appeal is whether $60,000.00 is a miscarriage of justice under the evidence and the law of this case? Defendants argue that this is so excessive as to shock the conscience, but more certainly any less would be to shock true conscience under this record.

The evidence of Catherine's qualities was well established by competent and disinterested witnesses. Mrs. Frahm her home room teacher testified "She was a good

student—an "A" student" and she was very neat in appearance—a quiet girl, but she had many friends. * * * She was above average and quite sophisticated for her age in that manner that eighth graders are not very old." (R.T. 108) Her A grades she earned in English show from the report card Exhibit 23. Mr. Donnelly her general science teacher testified she was "Very very capable girl. She had real good ability and she was very stable, and she was on outstanding student. She was a cut above the average." (R.T. 186) That her general intelligence was "very high, as through testing, I don't know, but I know she was an outstanding student and a tremendous quest for knowledge." (R.T. 187) Mr. Donnelly who also taught physical education said her health was good and "a very radiant person—very pleasant." (R.T. 188) Her report card Exhibit 29 shows her A grades in science. Mr. Bastian her French II teacher testified Catherine was "a wonderful girl. It was a pleasure to have her in my class." She was "intelligent and sweet * * * an "A' honor student." (R.T. 190) That "she was a near perfect person. A very capable girl," with unlimited potential. (R.T. 192) Exhibit 30 her French report card shows A's for all grading periods and the teachers comment Elle fait tre's bien which Mr. Bastian translated for the jury "You are doing very well." (R.T. 191) Mr. Merrell her American History teacher testified she was a "Very good organizer and extremely conscientious" and she stood out in his memory thusly "this is the first individual I ever had who voluntarily conducted themselves in such an orderly procedure. That doesn't mean to say there are not many many other wonderful stu-

dents, but she had the particular quality that seemed to be peculiar to her." (R.T. 194) Mr. Merrell had taught in the Boise School system for 12 years. (R.T. 193) Her history report and Exhibit 31 showed her B grade which Mr. Merrell testified "would have been a B plus instead of a straight B," and she was college material. (R.T. 195) Mr. Patterson Catherine's mathematics teacher testified "She was a very fine girl" (R.T. 326) and "She was an excellent student" and that "she would have been good college material." (R.T. 327) Exhibit 40 her Math 8 report card shows her A grades in that subject. These are the evidences that give the substantial values to Catherine's life that was lost to her mother and father, and the comfort that would normally flow from such accomplishmens, and proper items for jury consideration under the Idaho rules of law and that of the *Hepp* case in particular.

Appellants urge that Catherine would likely marry, as though such would diminish or eliminate the loss of society, companionship and comfort that a parent receives from a good child. It is a matter of common knowledge and understanding that such may more likely enrich family relationship within these legally compensable items of damage and reduce the monetary expense of children. It would be entirely wrong to assume reduction of damage because of marriage of a child. Opportunity for society companionship and comfort is not to be limited to the period that a child might be living with parents as test of damage for wrongful death. The test is a living or deceased child, and the comfort parents have from this fact as concerns the mu-

tual lives and futures through the respective life expectancies, whether married or not. In wrongful death cases there are more important losses than monetary contributions, food, support, shelter, clothing and the like, and this case is fitting example. The value of Catherine's life to her parents is far beyond any petty effort for reconciliation of the nominal items of her support of them, or their support of her.

Appellants argument that if and when Catherine were married cause of action for wrongful death would not lie in her parents, is answered by the fact that the cause of action accrued as of the time of the wrongful death and the rights under the law fix at that time. To speculate about when and if she might marry has no place in determining propriety of the jury award for her wrongful death. The rights to recovery of what may be just under all circumstances of the case determine on the relationship existing at the time the cause of action accrues.

Idaho Code Section 5-310, provides:

> "The parents may maintain an action for the injury or death of a minor child, * * * when such injury or death is caused by the wrongful act or negligence of another, * * * such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person."

Idaho Code Section 5-311, provides:

> "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; * * *. In every action under this and the preceding section, (5-310) such damages may be given as under all the circumstances of the case may be just."

It can clearly be seen from this law that the parents have the cause of action to recover from the wrongdoers for the death of their minor child damages as may under all the circumstances of the case be just. Only when the decedent not a minor is the cause of action in the heirs or personal representatives of the decedent. There is no legal basis for appellants' contention that if after the minor should marry the parents rights to damages would terminate. There could be no legal basis for so instructing a jury accordingly, and of course such was not done in this case, and in short Catherine's prospects of subsequent marriage is entirely irrelevant, and no evidence in this connection is in the record.

Hayward v Yost, 1952 72 Idaho 415 242 P2d 971, a later Idaho case following the rules of *Hepp v Ader* supra, in a child injury case holds:

> "The amount of damages to be allowed the child for personal injuries and also to his parents is primarily for the jury to determine and this court will not disturb such verdicts except where is clearly appears that the trial court abused its discretion. Koch v Elkins, 71 Idaho 50, 225 P. 2d 457. The appellants raised the contention that the verdicts were excessive by their

motions for new trial in each case; the trial court denied such motions for new trial and held that the verdicts were not excessive; such ruling by the trial court is entitled to weight in this court and will not be set aside in the absence of abuse of discretion. Kock v. Elkins, supra."

"The facts in this case are not such that any excess appears as a matter of law or the amount is such as to suggest at first blush the presence of passion or prejudice on the part of the jury and we cannot say, after carefully examining the evidence, and under the facts in this case, that either verdict is excessive or that the jury was motivated by passion and prejudice in returning the verdict in either case or that the trial court abused its discretion in refusing to set aside either verdict and grant a new trial. Garrett v Taylor, supra; Checketts v. Bowman, supra; Bates v. Siebrand Bros. Circus & Carnival, 71 Idaho 318, 231 P.2d 747."

"The statute, Sec. 5-311, I.C., provides that "such damages may be given as under all the circumstances of the case may be just"; under this statute grief and anguish are not elements entering into the determination of such damages. Checketts v. Bowman, supra; Hepp v. Ader, 64 Idaho 240, 130 P.2d 859; 15 Am. Jur. Sec. 180, p. 597; 39 Am. Jur. Sec. 80, p. 726. It is a presumption that the jury after hearing all testimony and receiving the instructions of the court with reference to the amount of damages, took into consideration all elements of damages set out in the instruc-

tions of the court. Summerfield v. Pringle, 65 Idaho 300, 144 P.2d 213."

The district judge in this Jarrett case correctly instructed that no award could be made for grief and anguish, (R.T. 447, Inst. 34) and there is nothing in the record to show the jury failed to follow this instruction and the presumption is that the jury did not include in their verdict any amount for grief and anguish. The defense point that the case must be directed toward recovery for grief and anguish, is not true. The record is immaculate that all basis of recovery was based upon loss of Catherine's life to her parents, and no award was to be made for grief or anguish. The court instructed the jury specifically on this, "Grief and anguish, however, are not to be considered by you as element of damages." (Inst. 34, R.T. 447) He did properly instruct "you may also consider such comfort, society and companionship she would have afforded to her parents had she lived." (Ins. 34, R.T. 447) It cannot be found from the record in this case that the jury did not follow the court's instructions, and they could certainly be completely objective on the evidence and find the value of the loss, without any grief or anguish, far in excess of the $60,000.00 awarded. The value of the loss of the life of Catherine to her parents was the province of the jury, and the trial contained no error to prevent them from properly deciding that question before them.

The case was prosecuted on the theory that the compensable damage was the lifetime loss to the parents of the so-

ciety, companionship and comfort of Catherine, within the rules of the *Hepp* and *Hayward* cases.

The $60,000.00 award was based upon the most competent of evidence, the value of the life of a quality girl to her parents. From the reported record in the case of *Checketts v Bowman* 1950, 70 Idaho 463 220 P2d 682 there is little to make any comparison of the two cases on the amount of award. It is not really accurate to evaluate child death cases simply by the age and sex of the child and the amount of award, and particularly for comparison as argued by defense that the death of an 8-year old boy is from a damage standpoint worth more than a 14 year old girl. Nothing could be farther from the truth, and each wrongful death case must rest upon its own facts. The particular human element becomes involved, and the value of such human life is not to be lightly regarded. While it may be easier to fix values on machines and livestock that would exceed $60,000.00 is it to be held (as contended by appellants) that the jury here went far beyond any reasonable, logical or rational award to find $60,000.00 for the loss of Catherine Jarrett? While she would be giving her parents something more valuable than money, the law provides that the jury has the duty of transposing that into money as best they can under the circumstances as may be just. Any failure of the jury here was in not awarding more for the loss to the appellees.

Although wrongful death case awards can not properly be cited as precedent authority as to amount, as evidence is normally too varied, we can cite some cases which show

more reasonable values for child loss cases, recognizing that there are others below. Juries have varied widely and the stare decisis does not provide best example.

In *Royal Crown Bottling Company v Bell,* 1959 Ga. 111 SE2d 734, it was held on appeal that $54,000.00 to mother for death of 17 years old married daughter was not excessive as to show bias or prejudice on the part of the jury, and denial of defense motion for judgment notwithstanding the verdict or for new trial was affirmed.

Blisard v Vargo, 1961 6th Cir. Mich D.C. 286 F2d 169, held $50,000.00 verdict for wrongful death of 8½ year old boy who was both bright and steady did not entitle defendant to new trial on ground of excessiveness, and the Circuit Court held:

> "Our authority in such a case is a very limited one. We find no abuse of discretion by the trial judge. The judgment will be affirmed."

Mann v Bowman Transportation, Inc., 1962 4th Cir. So. Car. D.C. 300 F2d 505, affirmed a judgment on verdilct for $55,000.00 to parents for death of 20 year old son against the defense contention that it was excessive as to the $27,500.00 for the father because divorced from the boys mother, where they said the father still suffered loss;

> " * * * or that he would not lose future companionship as a result of his son's untimely death? These questions were for the jury to determine, and there has been no contention, nor is there anything to indicate, that the verdict of the jury was the result of mistake, caprice,

passion, prejudice or was otherwise improperly motivated."

In *Sandifer Oil Co., Inc. v Dew* 1954, Miss. 71 So 2d 752, a $90,000.00 verdict was affirmed against the contention it was excessive for the death of a 14 year old girl who was a good daughter and sister. On appeal from denied motion for a new trial the court said:

> "It was the province of the jury, and the jury alone, to measure in dollars and cents the amount due him for physical and mental anguish and suffering, and, unless in a case where the verdict plainly shows that the jury must have been influenced by passion, prejudice, or corruption, this court never interferes with their finding as to damages. * * * This court has no scale delicate enough to weigh physical and mental anguish. At best it is an extremely difficult task. The law has committed this delicate task to the unbiased judgment of the 12 plain, practical, every day men who compose the jury, and it can nowhere be more safely rested than in the application of their good sense and honest judgment to the particular facts proven in each particular case."

Mock v Atlantic Coast Line R. Co., 1955 S.C. 87 SE2d 830 held it was not an abuse of discretion for trial court's refusal to grant a new trial for excessive verdict which awarded $50,000.00 compensatory and $15,000.00 punitive damages to father of 12 year old son who was killed in a train car accident when his mother drove the car into path of oncoming train. Here the court held:

> "* * * The unquestioned power of this court thus to strike down the judgment of the lower court has been and should continue to be exercised only in those rare instances in which the amount of the verdict is so shockingly excessive as manifestly to show that the jury was actuated by passion, partiality, prejudice or corruption."

In *McKirdy v Cascio* 1955 Conn. 11 A2d 555 an award of $50,000.00 for the wrongful death of an 18 year old boy who had just completed high school and planned to go to college, was held not excessive, and said:

> "The only practical test to apply to this verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption. (citing cases) The verdict in this case meets this test. * * * There is no error."

Making book on the many decisions under verdicts for amounts of damages really can accomplish no practical precedent for award in any particular case. Value of human life is not something that can be so categorized. What appears in the instant case before the court is the important consideration. The test is whether the jury's finding of just award is in fact a manifest miscarriage of justice. It is earnestly submitted that such is not the fact in this Jarrett case. The jury verdicts effectively protect the defendants in the many lower value cases and only rarely have remit-

turs been warranted. 14 ALR 2d 550, Annotation on excessiveness and inadequacy of damages for personal injury resulting in death of infants, and ALR 2d Supplemental Service 1965 page 152. Higher values than the older cases reflect is called for in the modern time, and surely the verdict finding the life of Catherine to be worth $60,000.00 could not fairly shock the conscience as being excessive under the record. When the facts justify no one needs fear proper first impression precedent. Many human death cases are measured in hundreds of thousands of dollars and sustained by our highest courts.

The appellants whole position on damages is succinctly summarized by their announcement that the judgment is "just too high." But reversal would require evidence of why, and the record doesn't satisfy their contention. The principal thrust of the defense is that the life of a minor child just can't be worth $60,000.00 to the parents. This argument can't be met founded as it is in mystery and abstract depreciation for the values of human life. Undoubtedly our jury system is the best way to obtain the best answers possible to admittedly difficult questions when evaluating loss of human life. To set out all of the rational reasons from the record why the jury found the way they did after their participation in the trial would be impossible, but to impeach their verdict for the reason that it was just too high would to violence to the fundamental rights of trial by jury.

Appellants argue that there has never been so large an award in Idaho for death of a minor child, but why should

human life be worth less in Idaho? Perhaps there has not heretofore been such comparable circumstances under which the jury was to decide what was just. Most assuredly the evidence of Catherine and her fine qualities shows the loss was ample and substantial, and there is no evidence to show the jury didn't exercise their best judgment. The record is clear that there was no passion or prejudice. The record was orderly made and only the cold plain facts of what happened and its results were before the jury, and there is no basis for urging that their verdict was given under influence of passion and prejudice, nor is there any justification for appellants to assume that the jury was attempting to inflict punishment or retribution on any defendant. It would be most difficult to see how the jury could have found that the value of Catherine's life could be worth any less to her parents than the verdict of $60,000.00

Before a new trial is to be granted upon the grounds of excessive damages appearing to have been given under the influence of passion and prejudice, such fact must be made clearly to appear to the court. *Short v Boise Valley Tractor Co.,* 1924 38 Idaho 593 225 Pac. 398. *Ellis v Ashton and St. Anthony Power Co.,* 1925 41 Idaho 106 238 Pac. 517, followed by *Osier v Consumers Co.,* 1926 42 Idaho, 789 248 Pac. 438, where it was held:

> "We now take occasion to say that verdicts will not be interfered with by this court on account of being excessive unless the facts are such that the excess can be determined as a mattr of law or that the verdict is so excessive as to be shocking to one's conscience and

to clearly indicate passion, prejudice or corruption on the part of the jury.

Verdicts rendered 10, 15 or 20 years ago are of little help in determining what amount is now excessive in a personal injury case. The present cost of living must be considered and the diminished purchasing power of the dollar must be taken into consideration when estimating damages."

And in *Nelson v Johnson* 1925 41 Idaho 697 243 Pac. 647 the court in holding it must be made to clearly appear that a verdict was given under the influence of passion or prejudice before it may be set aside as excessive, said:

"There is no evidence or intimation in the record that the jury was actuated by any bias or prejudice in awarding this sum or that the instructions given were not in keeping with the evidence adduced. In such a case the presumption arises that the jury took into consideration all the elements of damage set out in the instructions and that the damages given were not excessive or given by reason of any passion or prejudice and we see no reason to disturb the verdict."

Accord *Reinhold v Spencer* 1933 53 Idaho 688 26 P2d 796.

The cases of *Checketts v Bowman,* 1960 70 Idaho 463, 220 P2d 682, and *Covey Gas & Oil Co. v Checketts,* 1961 9th Cir. D.C. Idaho 187 F2d 561, relied upon by appellants for authority for remittitur have important distinctions to the case at bar. In the *Bowman* case the trial judge, who

had of course viewed the whole trial process, in exercise of his discretion had granted remittitur of $20,000.00 on the $40,000.00 verdict finding that the verdict was excessive, and as alternative to acceptance granted defense motion for new trial. The appellate court finding that the trial court had not abused his discretion affirmed the remittitur. Then the parents of the deceased child who were the plaintiffs in the wrongful death action in the trial court dismissed the suit, and filed a new action in the United States District Court for Idaho against Covey Gas & Oil Co., the owner of the truck that was being driven by Bowman when it struck and killed their 8 year old son. A $35,000.00 verdict resulted from the trial in the Federal District Court, but on appeal to this 9th Circuit Court it was held "This is a clear case of what is aptly called "forum shopping," and granted remittitur reducing the judgment again to $20,000.00 as originally found by the state district court trial judge. No such comparable circumstances occurred in the case at bar, and the *Checketts* cases are not thus precedent for remittitur here as contended by appellants.

It is not questioned but what this court has power to review amount of judgment based upon jury verdicts, *Southern Pac. Co. v Guthrie,* 1951 9th Cir. N.D. Cal., 186 F2d 926, and defense authority of *Dagnello v Long Island R. R. Co.,* 1961 2nd Cir. SD NY 289 F2d 797, but *Union Pacific R. R. Co., v Johnson,* 1957 9th Cir. D Idaho 249 F2d 674 appears to announce the rule that the trial court has important discretionary powers in matters of new trial on contention of excessive verdict which requires real show-

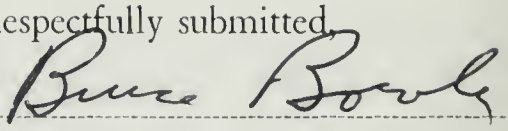
ing of abuse to change. Accord *Steinbock v Schiewe,* 1964 9th Cir. D Oregon 330 F2d 510; and *MacDonald Engineering Co. v Hoover,* 1961 SD Iowa 8th Cir. 290 F2d 301. While remittitur may not be uncommon at the trial court level, the authorities indicate that appellate courts, rarely need to use it, and then only where there is substantial evidence in the record to support miscarriage of justice because of failure of the trial judge. No such failure by Judge Taylor in this case can be found.

The thrust of appellants' position that children just are not worth much, and that their society, companionship and comfort are not real compensable things, and if a jury should make a substantial award it necessarily must have been the result of passion and prejudice is not sound. There was no defense evidence that Catherine's life was worth less to her parents than the $150,000.00 relief sought. Parents regard the value of their own lives less than that of their children, this is a universal rule of humanity. Life and and health are our most valuable assets. The picture of Catherine properly in evidence Exhibit 28 is proof beyond thousands of words of the fine qualities, and characteristics of the decedent lost to the appellees. These were facts properly before the jury for their finding of value under the law to award what was just.

These are the reasons why the judgment should be affirmed.

DATED: February 1, 1967.

Respectfully submitted,



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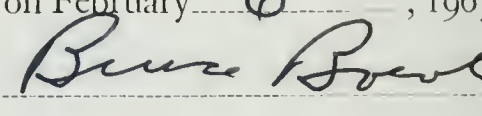
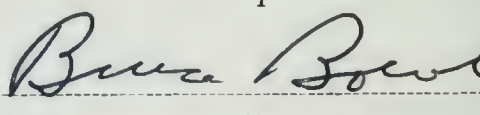
Service of the foregoing Brief made by mailing three copies thereof to E. C. Phoenix, Box 530, Pocatello, Idaho, Attorney for Appellants on February 6, 1967.



Attorney for Appellees

CERTIFICATE

I Certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.



Attorney for Appellees

APPENDIX, TEXT OF OPINION

Miller v. Union Pacific R. Co., 1933 2 90 US 227, 78 Led. 285.

"Whether a passenger or a guest in a public or private conveyance, having no control over its movement, may be denied a right of recovery for personal injury or death on the ground of contributory negligence, depends upon his own failue to exercise a proper degree of care, and not upon that of the driver. This is true whether the passenger is the wife of the driver as in other cases. (citing cases) And while the state decisions are not uniform on the subject, the Federal rule is definately settled that the burden of proving such contributary negligence rests, in all cases, upon the defendant." (citing cases)

"In the present case, as already appears, the burden was sustained as to the husband. It was not sustained as to the wife. As to her, there is an entire absence of evidence on the point. Whatever duty rested upon her under the circumstances, for aught that appears to the contrary, may have been fully discharged. It properly cannot be said from anything shown by the record before us that she did not maintain a careful lookout for the train, or that, if aware of its approach, she did not warn her husband or urge him to stop before entering upon the crossing. Want of due care for her own safety must be proved; it cannot be presumed. The presumption is the other way. (citing authorities) If, as here there be no evidence which speaks one way or the

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other with rspect to contributory negligence of the person killed, it is presumed that there was no such negligence. Looney v Metropolitan R. Co. 200 U.S. 480, 50 Led 564."

"Here the wife was not in control of the movement of the automobile. She could only note the danger, warn her husband, and urge him to stop. She may have done so, and he, misjudging the situation or taking the chance, have gone forward nevertheless. Or she may have seen the approaching train, observed that her husband was also aware of the fact and, relying upon her knowledge of his habits and character, trusted him, with good reason until it became too late to interfere, to do whatever was necessary to avoid the danger. The applicable rule is found in Southern P. Co., v Wright (C.C.A. 9th) 248 Fed. 261, 264. That was a case where one Wright was riding in a motor truck with an experienced chauffeur as driver. A collision occurred between the truck and a train, which resulted in Wright's death. It did not appear whether Wright saw the train before it was seen by the chauffeur. The court said that he might have seen it and yet reasonably remained silent on the assumption that, the view being unobstructed, the chauffeur also saw it and was governing himself accordingly. "So that up to the very time that the truck approached the main track he (Wright) may have reasonably supposed that Tucker(the chauffeur) would stop the car in time to avoid a collision. And when he realized that he was

going to attempt to cross ahead of the train, what could, or should he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here, with the truck a half a second sooner or the train a half a second later, the tragedy would have not happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only 30 miles an hour—the speed was probably greater—it was only about 30 seconds from the time it came into view a quarter of a mile away until it crashed into the truck."

Accordingly, it was held that the question of Wright's contributory negligence was not one of law but one of fact for the jury.

To the same effect, see Chicago & E. I. R. Co. v Divine (C. C. A. 7th) 39 F. (2d) 537, 539; Thenholm v Southern P. Co. (C. A. A. 9th) 8 F. (2d) 452; Baker v Lehigh Valley R. Co., 248 N.Y. 131, 135, 136, 161 N.E. 445; Nelson v Nygren, 259 N.Y. 71, 75, 181 N.E. 52; Crough v New York C. R. Co. 260 N.Y. 227, 232, 183 N.E. 372. In the Baker Case, 248 N.Y. 131, 161 N.E. 445 supra, the New York Court, holding that the question of the contributory negligence of an automobile passenger killed in a train collision was for the jury and not the court, said:

"Believing the car was about to stop, he may have thought that warning would be needless, and discov-

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ering too late that the car was going on, he may have thought that interference would be dangerous. These and like possibilities were to be estimated by the triers of the facts. They make it impossible to deal with the issue as a question for the court."

Bradley v Missouri P. R. Co. (C. C. A. 8th) 288 Fed. 484, is cited by respondent to the contrary; but to the extent that it conflicts with the view we have expressed, that case is disapproved.

But the argument is advanced that even though the railroad company be guilty of negligence and the wife be absolved from the charge of contributory negligence, nevertheless the railroad company is not liable, because, under the circumstances here disclosed, the proximate cause of the wife's death was not its negligence, but the negligence of the husband in driving upon the track in the fact of the approaching train. The validity of this contention depends altogether upon whether the negligence of the husband constituted an intervening cause which had the effect of turning aside the course of events set in motion by the company, and in and of itself producing the actionable result. The evidence here does not present that situation. Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, co-operating to produce the result. As this court pointed out in Washington & G. R. Co. v Hickey, 166 U.S. 521, 525, 41 L.ed. 1101, 1102, 17 S. Ct. 661, the vice of the argument consists in the at-

tempt to separate into two distinct causes (remote and proximate) what in reality is but one continuous cause —that is to say, an attempt to separate two inseparable negligent acts which, uniting to produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile.

The negligence sought to be established against the railroad company was not only failure to sound the whistle, but operation of the train at a rate of speed dangerous and unusual, and which necessarily would bring the train into the city at a speed far beyond the limit prescribed by the city ordinance. Assuming, upon these facts, that a finding by the jury that the train was negligently operated would be justified, such negligence continued without interruption down to the moment of the accident. The same is equally true in respect of the contributory negligence of the driver of the automobile. The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith so as to constitute in point of time and in effect what was essentially one transaction.

The rule is settled by innumerable authorities that of injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused

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by his negligence alone. "It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury."

* * * The court below erred in holding as matter of law that the wife was guilty of contributory negligence and, therefore, its judgment cannot stand.

Judgment reversed and cause remanded to the district court for further proceedings in conformity with this opinion."

Appendix, Text of Statutes

Section 5-310 Idaho Code.

Action for injury to child.—The parents may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another, but if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

Section 5-311 Idaho Code.

Action for wrongful death.—When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

Section 49-1102 Idaho Code.

Persons under the influence of intoxicating liquor or of drugs.—(a) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under

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the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.

(b) In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

1. If there was at that time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicateing liquor;

2. If there was at that time in excess of 0.05 percent but less than 0.15 percent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

3. If there was at the time 0.15 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

4. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influenc of intoxicating liquor.

Section 62-412 Idaho Code.

Bell or whistle to be sounded.—A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway; or an adequate steam, air, electric or other similar whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of $100.00 for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the prosecuting attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains or cars, when the provisions of this section are not complied with

APPENDIX OF EXHIBITS

Exhibits		Description	Identified		Offered		Received or Rejected	
Pl's #	1	Aerial Photograph	R. T.	23	R. T.	24	R. T.	26
Def. #	2	Photograph	"	27	"	30	"	68
Def. #	3	Photograph (Rejected)	"	21	"	30	"	68
Def. #	4	Photograph	"	21	"	30	"	68
Def. #	5	Photograph	"	21	"	30	"	123
Def. #	6	Photograph	"	21	"	30	"	68
Def. #	7	Photograph	"	21	"	30	"	68
Def. #	8	Photograph	"	21	"	30	"	68
Def. #	9	Photograph (Rejected)	"	21	"	30	"	68
Def. #	10	Photograph	"	21	"	30	"	68
Def. #	11	Photograph (Rejected)	"	21	"	30	"	68
Def. #	12	Photograph	"	21	"	30	"	68
Def. #	13	Photograph (Rejected)	"	21	"	30	"	68
Def. #	14	Photograph	"	21	"	30	"	68
Def. #	15	Photograph	"	21	"	30	"	34
Def. #	16	Photograph	"	21	"	30	"	34
Def. #	17	Photograph	"	21	"	30	"	34
Def. #	18	Photograph	"	21	"	30	"	34
Def. #	19	Photograph	"	21	"	30	"	34
Def. #	20	Photograph	"	21	"	30	"	34
Def. #	21	Panoramic photograph	"	48	"	50	"	100
Def. #	22	Panoramic photograph	"	51	"	51	"	99

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